No. 83-2030

In the
Supreme Court of the United States

OCTOBER TERM, 1984

THE BOARD OF EDUCATION OF THE CITY OF OKLAHOMA CITY, STATE OF OKLAHOMA,
Appellant

v.

THE NATIONAL GAY TASK FORCE,
Appellee

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR APPELLEE

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STATEMENT OF THE CASE

The statute challenged in the courts below, Oklahoma Statutes, Title 70, Section 6-103.15,[1] was enacted by the Oklahoma

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[1] The statute is reprinted in full in the Joint Appendix (hereinafter, cited as "JA") at JA11-12. The opinions of the courts below are reprinted in the Appendix to the Jurisdictional Statement (hereinafter, cited as "App.").

Legislature in April 1978, as an addition to the section of Oklahoma law providing for dismissal of public school teachers. The general dismissal-for-cause provision, *id.*, Section 6-103, authorizes the dismissal of any teacher for actions demonstrating "immorality, willful neglect of duty, cruelty, or . . . moral turpitude." It could hardly have been doubted, then or now, that this general dismissal provision, entirely independent of the addition of Section 6-103.15, would amply authorize the firing of any teacher who were to incite or coerce school children into committing illegal sexual acts — whether homosexual or heterosexual. Nor could it have been doubted that Section 6-103 encompassed the state's power to fire any teacher whose speech imminently threatened such harms. Thus, Section 6-103.15, although labeled a provision concerning "homosexual conduct or activity," was clearly not added to the teacher-dismissal statute in order to fill any gap in the state's arsenal of defenses against teachers who actually might threaten the physical well-being of their students, for no such gap existed.

Rather, Section 6-103.15 was enacted to permit the state to fire any teacher who so much as "advocate[s]," "encourage[s]," or "promote[s]" "public or private homosexual activity"[2] in a manner open and public enough to "come to the attention of school children or school employees."[3] And it was only these

[2]Section 6-103.15(A) defines "public homosexual activity" as the commission of sodomy, which is still criminal for all persons in Oklahoma, *see* Okla. Stat., Title 21, Section 886, if that crime is committed "with a person of the same sex," Section 6-103.15(A)(1)(a).

[3]The statute was enacted on the crest of a wave of cross-country anti-homosexual activism spearheaded by the singer, native Oklahoman, and indeed, former Miss Oklahoma, Anita Bryant. The Oklahoma Legislature, while considering the bills it soon enacted as Section 6-103.15, was urged by Ms. Bryant in a speech she gave in the Oklahoma Senate chambers to approve such legislation, which she believed would help to stop "the flaunting of homosexuality," and to protect school children from exposure to those who "profess

three provisions that the decision below invalidated as posing an explicit and excessive threat to freedom of speech. *See* 729 F.2d 1274 (App.7a), 1275 (App.8a).

In its complaint filed below in the District Court for the Western District of Oklahoma, appellee National Gay Task Force alleged, *inter alia*, that "[i]ts membership . . . includes both present and prospective teachers and principals of the Oklahoma City School District, which members desire to discuss the subject of homosexuality within such school district,

homosexuality." *See* "Anita, Gays have their say in separate Capitol events," *Oklahoma City Times*, at 1-2 (Feb. 21, 1978); "Anita's Plea to Senate: Don't Legislate Immorality," *Daily Oklahoman*, at 1-2 (Feb. 22, 1978).

A statute virtually identical to Section 6-103.15 was placed on the November 1978 state ballot in California as an initiative measure (Proposition 6, *reprinted at* California Official Voters Handbook 28-31 (1978)), but was defeated at the polls. President Ronald Reagan, who was then the former governor of California, voiced strong opposition to Proposition 6 in an op-ed column he wrote just prior to Election Day. In that column, he argued:

> Had Proposition 6 been confined to prohibiting the advocacy in the classroom of a homosexual lifestyle (and sex-before-marriage, "swinging," and adultery, for that matter), it would . . . enjoy . . . wider support. . . . Instead, the measure calls for firing teachers who engage in . . . "advocating, . . . encouraging or promoting private or public homosexual activity." It is that passage — and especially the undefined word "advocacy" — that has generated heavy bipartisan opposition to the measure.
>
> Since the measure does not restrict itself to the classroom, every aspect of a teacher's personal life could presumably come under suspicion. What constitutes "advocacy" of homosexuality? Would public opposition to Prop. 6 by a teacher — should it pass — be considered advocacy?
>
> * * * * *
>
> Here is one heterosexual . . . who, where Prop. [6 is] concerned, hopes the answer is "no."

Reagan, "Two Ill-Advised California Trends," *Los Angeles Herald Examiner*, at A-19 (Nov. 1, 1978). With the defeat of Proposition 6, Oklahoma's Section 6-103.15 remains without parallel in any other jurisdiction.

but fear to do so because of the enactment of 70 O.S. Sec. 6-103.15. Such members wish to advocate civil and constitutional rights for homosexual persons but fear and are inhibited [in] their public and private expression of opinion on homosexuality, and on civil liberties for homosexuals because of the possibility of dismissal and/or foreclosure of future employment in the Oklahoma City School District." Complaint, para. 4 (JA 4).[4] The complaint further alleged that this chilling effect on its members' speech and association rights violated the First and Fourteenth Amendments. *Id.* at para. 9(a) (JA6). On these as well as assorted other constitutional claims, the district court (Eubanks, J.) denied the summary judgment moved for by the National Gay Task Force. *See* App.1b-22b.[5]

The Tenth Circuit, in an opinion written by Judge Logan and joined by Judge McKay, reversed the judgment of the district court *only* insofar as the lower court had upheld the statute's authorization to public officials to deny public school teaching jobs[6] to those who engage in "advocating . . . encouraging or promoting public or private homosexual activity," 729 F.2d at 1275 (App.7a) (ellipsis in the original). The court held these three provisions "unconstitutionally overbroad," with a "real and substantial" deterrent effect on expres-

[4] This allegation was supported by an affidavit submitted by appellee in support of its motion in the district court for summary judgment. *See* R. 223 (Attachment to Motion of Plaintiff for Summary Judgment, filed Nov. 18, 1981).

[5] In connection with appellee's motion for summary judgment, the parties filed a stipulation in the district court on November 25, 1981, stating that they "agree there is no genuine issue as to any material fact herein, that there is no necessity or desirability of an evidentiary hearing or the taking of evidence, and that the Court may decide the issues presented by the pleadings as a matter of law." R.286.

[6] Section 6-103.15(B) includes within its sweep student teachers and teachers' aides as well as teachers. The term "teachers" is intended hereinafter to include all these groups.

sion protected by the Constitution. *Id.* at 1274 (App.6a). The court left fully intact, however, that portion of Section 6-103.15 authorizing schools to fire or refuse to hire teachers who engage in public homosexual acts. *See id.* at 1273 (App.4a-5a). It also left fully intact that portion of Section 6-103.15 authorizing schools to fire or refuse to hire teachers who "solicit" or "impose" homosexual activity — expression going beyond mere abstract advocacy. *See id.* at 1274-75 (App.6a-8a).

To be sure, as the court noted, *id.* at 1274-75 (App.6a-7a), Oklahoma, by adding Section 6-103.15, did not guarantee automatic exclusion from its public schools of all teachers who might give voice to views sympathetic to homosexuals and their rights, for the statute left school authorities with discretion to tolerate instances of pro-homosexual speech as harmless, in a particular case, by reference to the four criteria listed in Section 6-103.15(C), *see* JA12. But, as the court below found, these factors left discretion to censor speech simply too unbridled in the hands of school authorities, guiding them as to neither the "weight" nor the necessity of these factors to a finding of teacher unfitness. 729 F.2d at 1275 (App.7a). Judge Barrett dissented, finding the statute's anti-advocacy provisions an appropriate prophylactic against the "encourage[ment of] school children to commit the abominable crime against nature." *Id.* at 1277 (App.11a).

The Oklahoma City Board of Education brought an appeal in this Court from the Tenth Circuit's judgment; the National Gay Task Force filed no cross-appeal on the issues decided adversely to it. Accordingly, all that is at issue in this case is whether the First Amendment forbids Oklahoma from adding, above and beyond its arsenal of defenses against harmful conduct by public school teachers, a separate penalty upon pure speech that expresses a point of view sympathetic to homosexuals.

SUMMARY OF ARGUMENT

All that the circuit court excised from Oklahoma's statutes was this explicit threat, directed by law in 1978 to every public school teacher in the state, and to every person who aspires ever to teach in Oklahoma's public schools:

> If you value your job as a teacher, or want ever to hold such a position here, then make no statement in public, or within another's hearing, that might one day brand you as sympathetic to homosexuals or their rights, and take part in no group or activity that might be seen as so inclined. For any such statement or association might be deemed by school authorities to "advocate," "promote," or "encourage" homosexual activity; might well "come to the attention of school children or school employees"; might be thought to "adversely affect" students or school employees in some way; and might not be deemed so harmless by those in a position of authority as to qualify for dispensation under the "extenuating . . . circumstances" proviso of Oklahoma's law. The only way to be safe is either to steer clear of this whole topic and of groups concerned with it or, whenever the subject comes up, to proclaim your complete aversion to homosexuals and your unwavering disapproval of their activities and their cause.

The circuit court was entirely correct in holding this statutory threat — one that is apparently unique among the fifty states — facially repugnant to the First Amendment at the behest of teachers and would-be teachers who alleged that, but for this explicit threat, they would feel free to discuss the subject of homosexuality in public — a freedom the state's law had denied them.

With that threat removed, all of Oklahoma's public school teachers remain fully subject to the control of school boards as to what they teach; to dismissal for cause should they incite or solicit illegal acts or disrupt the school environment; and to criminal prosecution should they molest or make lewd or indecent proposals to any child. Thus no statement or action unprotected for public school teachers by the First Amendment is encouraged, and need go undisciplined, by virtue of the circuit court's ruling. All that the state lost with that ruling is the ability to proceed by means of an expressly censorial statute, one aimed against a viewpoint disfavored by the majority — something the state was never meant, under the First Amendment, to enjoy.

To disturb the circuit court's narrow ruling — even for the limited purpose of deferring a final federal adjudication until Oklahoma's courts have been given an opportunity somehow to recast the state's broad, viewpoint-specific provisions into a constitutionally tolerable form — would reinstate, for a period of time intolerable even if it proved brief, a regime of fear wholly inimical to the Constitution's free speech guarantee. No legitimate concern of Oklahoma, and none of the important purposes served by federal abstention in cases of readily narrowable state laws, would be advanced by such a step — or, indeed, by any step short of outright affirmance of the judgment below.

ARGUMENT

I. ON THEIR FACE, THE PROVISIONS EXCISED BY THE COURT BELOW FROM OKLAHOMA'S TEACHER-DISMISSAL LAW VIOLATE THE FIRST AMENDMENT.

The court below invalidated only that portion of Oklahoma's teacher-dismissal law which threatens every present or prospec-

tive public school teacher with loss of a job for merely "advocating," "encouraging," or "promoting" homosexual activity.[7] The court below ruled these provisions "unconstitutionally overbroad," finding their "deterrent effect" on legitimate expression to be "both real and substantial." 729 F.2d at 1274 (App.7a). Not only is this holding clearly correct; if anything, it understates the constitutional deficiency of the anti-advocacy provisions, for two reasons.

First, this is not a case where the state took aim even-handedly at legitimately proscribable conduct and simply overshot a bit, producing an "overbroad" statute that merely happens to sweep some protected expression within its reach.[8] Rather, this is a case where the state fired in the wrong direction altogether, taking aim directly at the expression of a specific point of view that it strongly disfavored.[9] Indeed, the anti-advocacy provisions could hardly have been more explicit in describing the suppression of ideas as their deliberate aim. *See* I.A. *infra*. Such a "censorial statute, directed at particular groups or viewpoints," *Broadrick* v. *Oklahoma,* 413 U.S. 601, 616 (1973), most plainly offends the rights and values the First Amendment was enacted to protect. For "[t]he essence of . . . forbidden censorship is content control. . . . There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard." *Police Department of Chicago v. Mosley,* 408 U.S. 92, 96 (1972).

[7] These three provisions of Section 6-103.15(A)(2) will be referred to collectively as the "anti-advocacy provisions." The circuit court explicitly left intact the provisions permitting job dismissal or rejection for "soliciting" or "imposing" homosexual activity. 729 F.2d at 1274 (App.7a) (holding statute unconstitutionally overbroad only insofar as it "proscrib[es] advocating, encouraging or promoting homosexual activity"), 1275 (App.8a) (reversing judgment of the district court only with respect to statute's penalty on "'advocating . . . encouraging or promoting public or private homosexual activity'" (ellipsis in original)). Appellee has not cross-appealed this part of the judgment below. Accordingly, whether homosexual *solicitation* is constitutionally protected is simply *not* an issue before the Court in this case. That issue, like the underlying question whether the Constitution protects homosexual activity itself, was left unresolved by the Court's disposition last Term of *New York* v. *Uplinger,* 104 S. Ct. 2332 (1984) (per curiam), and must await decision by this Court another day.

[8] Overbroad statutes of this sort might include a prohibition on *all* picketing which happens to sweep protected peaceful picketing within its reach, *see Thornhill* v. *Alabama,* 310 U.S. 88 (1940), or a law against *all* barratry which happens to sweep protected litigation practices within its reach, *see NAACP* v. *Button,* 371 U.S. 415 (1963).

[9] In this way, the anti-advocacy provisions are more like, for example, the ban on the peaceful public display of "any flag . . . as a sign, symbol, or emblem

Second, the statute's flat censorship is a wholly gratuitous means of achieving the State's aims. For entirely independent of the anti-advocacy provisions struck down below, Oklahoma has in place a mechanism for permissibly dismissing teachers who in fact engage in unprotected conduct — *without* regard to the viewpoint they espouse. *See* Statement of the Case, *supra,* and I.B(2) *infra*. Thus the excision of the anti-advocacy provisions from the state's law leaves Oklahoma fully equipped to deal in a constitutional manner with *any* teacher — whether or not he or she has ever expressed pro-homosexual views — who disturbs orderly school administration, upsets the curricular policies of educational authorities, makes sexual advances to students, or engages in otherwise unprotected conduct or speech. Thus facial invalidation in this case in no way poses the drawback it does in the ordinary "overbreadth" case, for it furnishes no escape, even temporary, to any third parties whose conduct could constitutionally be punished.[10] Accord-

of opposition to organized government" that was struck down in *Stromberg* v. *California,* 283 U.S. 359, 369-70 (1931). *See City Council* v. *Taxpayers for Vincent,* 104 S. Ct. 2118, 2124-25 & nn.12, 14 (1984).

[10] The danger of such escape, pending a state's rewriting of an invalidated law in appropriately narrowed form, has caused the Court "hesitation," *New York* v. *Ferber,* 458 U.S. 747, 769 (1982), in finding statutes facially void for

ingly, facial invalidation is not "strong medicine" here at all. *See Broadrick* v. *Oklahoma*, 413 U.S. at 613.

In short, the anti-advocacy provisions are void for "overbreadth" not only in the sense that they silence a range of protected expression that is substantial in relation to the statute's legitimate sweep,[11] but also in the sense that "in all [their] applications [they] directly restrict[ ] protected First Amendment activity and do[ ] not employ means narrowly tailored to serve a compelling governmental interest." *Secretary of State* v. *Joseph H. Munson Co.*, 104 S. Ct. 2839, 2852 (1984). The decision below properly excises from Oklahoma law this needlessly speech-suppressing and viewpoint-stifling means for achieving the state's aims.

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overbreadth. *See, e.g., Secretary of State* v. *Joseph H. Munson Co.*, 104 S. Ct. 1839, 1858 (Rehnquist, J., dissenting). Where, as here, that danger is absent, this reason to hesitate evaporates. *See also* note 46 *infra*.

[11] Clearly the anti-advocacy provisions are unconstitutionally overbroad in *at least* this sense, for they chill a vast range of plainly protected public expression (*see* I.A. *infra*), while hitting genuinely unprotected conduct, if at all, only fortuitously and redundantly (*see* I.B *infra*). It should be noted, however, that this is not the sort of "overbreadth" case in which a party whose own conduct is unprotected seeks to challenge a statute on the ground that it might impermissibly reach the protected expression of others. *See New York* v. *Ferber*, 458 U.S. 747, 768-69 (1982). Rather, appellee here objects to the silencing of *protected* expression in which *its own members* wish to engage, and in which they fear to engage solely because of this statute. *See* Complaint, para. 4 (JA4). The deterrent effect of the anti-advocacy provisions on *protected* expression, which the Court below found "real and substantial," 729 F.2d at 1274 (App.7a), is thus raised directly rather than hypothetically here. *Cf. Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 217 & n.16 (1975) (theater manager claimed, in anticipatory challenge to overbroad anti-nudity ordinance, that his own activities were protected).

A. The Anti-Advocacy Provisions Impermissibly Censor Protected Public Expression.

1. Threatening job dismissal for "advocating," "promoting," or "encouraging" homosexual activity chills all speech expressing a viewpoint favorable to homosexuals.

From the time Section 6-103.15 was enacted until the date of the decision below, all who taught or wished ever to teach in Oklahoma's public schools, including members of appellee National Gay Task Force,[12] could voice views sympathetic to homosexuals or homosexual rights only at peril to their jobs. For the statute threatens with dismissal or rejection all teachers and prospective teachers who speak publicly about homosexuality in any way at all — *unless* they express such unmistakable disapproval of homosexuals as to preclude any charge that they are directly or indirectly "advocating," "encouraging," or "promoting" homosexual activity. Oklahoma has thus gone even further than simply "restrict[ing] expression because of its . . . subject matter, or its content," *Police Department of Chicago* v. *Mosley*, 408 U.S. at 95, or removing "an entire

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[12] The standing of the National Gay Task Force to bring this challenge is undisputed before this Court. As the district court below held in denying appellant's motion to dismiss for want of standing, appellee sufficiently alleged that its members are suffering immediate or threatened injury because they "fear they could violate the statute through their rightful exercise of free expression," and are presently chilled by that fear from such expression. R.200 (Order of August 4, 1981). Appellee clearly has standing to represent its members in asserting this injury. *See Warth* v. *Seldin*, 422 U.S. 490, 511 (1975). Indeed, this is the very sort of case in which an association *must* represent its members' claims if those claims are to be asserted at all. For so long as the anti-advocacy provisions stood, no individual Oklahoma teacher could afford to reveal, by becoming a named plaintiff, either association with the National Gay Task Force, or desire to express views chilled by the statute, without directly risking his or her job. *Cf. NAACP* v. *Alabama*, 357 U.S. 449, 459 (1958).

topic" from public debate, *Consolidated Edison Co.* v. *Public Service Commission,* 447 U.S. 530, 537 (1980) — either of which would suffice to trigger "the First Amendment's hostility to content-based regulation," *id.* Beyond this, it has expressly subjected one specified viewpoint to official sanction,[13] while giving the opposite viewpoint free rein.[14]

There can be no doubt that such a threatened sanction inhibits a vast range of speech and association.[15] For teachers who seek

[13] This Court has long made clear that conditioning public employment on the sacrifice of protected expression is as potent a sanction as punishing such speech directly. *See Connick* v. *Myers,* 103 S. Ct. 1684, 1687 (1983); *Pickering* v. *Board of Education,* 391 U.S. 563, 568 (1968); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 605-06 (1967).

[14] Laws that "exclude one advocate from a forum to which adversaries have unlimited access," *Bolger* v. *Youngs Drug Products Corp.,* 103 S. Ct. 2875, 2890 (1983) (Stevens, J., concurring in the judgment), are especially repugnant to the First Amendment. *See, e.g., City Council* v. *Taxpayers for Vincent,* 104 S. Ct. 2118, 2128 (1984) (government may not "regulate speech in ways that favor some viewpoints or ideas at the expense of others"); *Perry Education Assn.* v. *Perry Local Educators' Assn.,* 103 S. Ct. 948, 957 (1983) (school board could not constitutionally seek "to discourage one viewpoint and advance another" by its rules of teacher access to interschool mail system); *First National Bank of Boston* v. *Bellotti,* 435 U.S. 765, 785-86 (1978) ("where . . . the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended"); *Madison School District* v. *Wisconsin Public Employment Relations Comm'n,* 429 U.S. 167, 175-76 (1976) ("To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees. . . . [W]hen the [school] board sits in public meetings to . . . hear the views of citizens, it may not . . . discriminate between speakers based on their employment, or on the content of their speech").

[15] The freedom to associate is deeply enmeshed with the liberties of expression protected by the First Amendment. *See, e.g., NAACP* v. *Claiborne Hardware Co.,* 458 U.S. 886, 907-08 (1982); *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 295-99 (1981); *Bates v. Little Rock,* 361 U.S. 516, 522-23 (1960); *NAACP v. Alabama,* 357 U.S. 449, 460-61 (1958). Hereinafter, references to freedoms of speech threatened by the anti-advocacy provisions are intended to encompass the freedom of association wherever relevant.

conscientiously to "avoid the risk of loss of employment, and perhaps profession," can do so, as Justice White wrote for the Court over two decades ago, "only by restricting their conduct to that which is unquestionably safe." *Baggett* v. *Bullitt,* 377 U.S. 360, 372 (1964). Does the teacher who expresses support for the repeal of the sodomy laws, who favors the enactment of anti-discrimination ordinances protecting homosexuals, or who vocally condemns violent attacks upon homosexuals[16] thereby "advocate" homosexual activity? Does a teacher's practicing membership in a religious denomination that blesses membership by homosexuals, or active involvement in a political organization, such as the National Organization of Women, or the national Democratic Party,[17] that expressly advocates civil rights for homosexuals, "promote" homosexual activity? Does a teacher "encourage" homosexual activity by discussing admiringly the lives or work of homosexual authors from Whitman to Wilde, from Cather to Keynes? "It is no answer to say that the statute would not be applied in such a case." *Keyishian* v. *Board of Regents,* 385 U.S. 589, 599 (1967). For — as President Reagan recognized in opposing a nearly identical law in California in November 1978, *see* note 3 *supra* — no teacher with a scrupulous regard for the law and a wish to retain

[16] Oklahoma City public school teachers and administrators alike voiced just such condemnation during the months preceding the enactment of Section 6-103.15, in direct response to recruitment by the Ku Klux Klan of youths in Oklahoma City high schools for a "declared war on homosexuals" that in fact produced a series of violent skirmishes. *See* "National Klan leader terms city youth recruiting good," *Oklahoma City Times,* at 1 (Jan.26, 1978).

[17] On July 17, 1984, at its National Convention, the Democratic Party — by the unanimous vote of the delegations of all the states, including Oklahoma — adopted a platform containing the following provision: "All groups must be protected from discrimination based on race, color, sex, religion, national origin, language, age, or sexual orientation. We will support legislation to prohibit discrimination in the workplace based on sexual orientation." *The Report of the Platform Committee to the 1984 Democratic National Convention,* at 34 (1984).

his or her job, and no young person aspiring to a career in public school teaching, will dare to find out.[18] Nor, of course, will such teachers venture forth to test the statute's boundaries by joining or contributing funds to lobbying organizations such as appellee National Gay Task Force, or by traveling to other cities — for example, in any of the 29 states that have long since decriminalized homosexual activity (*see* note 24 *infra*) — to take part in peaceful demonstrations on behalf of civil rights for homosexuals. Surely "[f]ree speech may not be so inhibited." *Baggett* v. *Bullitt*, 377 U.S. at 372.

Contrary to appellant's suggestion (*see* Appellant's Brief at 12-15, 36-37), the four factors that are to be additionally "considered" by school authorities when "making the determination" that a teacher is "unfit" on the basis of pro-homosexual advocacy in no way thaw the chill on such expression.[19] No

[18] Because "no teacher can know just where the line is drawn" around advocacy of homosexual activity proscribed by Oklahoma's law, the anti-advocacy provisions are also void because unconstitutionally vague. *Keyishian* v. *Board of Regents*, 385 U.S. at 599; *see also id.* at 609 ("[w]here statutes have an overbroad sweep, just as where they are vague,. . . . those covered by the statute are bound to limit their behavior to that which is unquestionably safe"). *See also Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 286-88 (1961) (invalidating loyalty oath required of public school teachers); *Baggett* v. *Bullitt*, 377 U.S. at 366-73 (same). The impermissible vagueness of the anti-advocacy provisions furnishes an independent ground for affirming the judgment below, for even though the overbreadth ruling by the court below obviated any need for it to reach the vagueness issue with respect to the anti-advocacy provisions, those provisions were squarely challenged on that ground below in both the district court, *see* Complaint para. 9(b)-(c) (JA6), and the court of appeals, *see* Brief of National Gay Task Force, filed below on October 19, 1982, at 18-20.

[19] What appellant calls the fifth limiting factor — that pro-homosexual advocacy is proscribed only if expressed "in a manner that creates a substantial risk that [it] will come to the attention of school children or school employees," Section 6-103.15(A)(2) — is no limiting factor at all. For *all* open advocacy obviously bears such a risk, by virtue of the very fact that it is public. This supposed "limit" thus at most frees only the most private and secretive expression, carefully closeted away from the reach of community ears. It leaves fully in place the statute's chill on the wide range of public expression far closer to the core of First Amendment protection.

teacher or would-be teacher can find much solace in the statute's suggestion that one who advocates, encourages, or promotes homosexual activity may perhaps be deemed fit notwithstanding such speech if school authorities should happen to find that individual's speech sufficiently harmless by reference to such factors. For these factors, which appellant calls "nexus requirements," are in reality but an after-the-fact licensing scheme lodging such broad discretion in public school officials that their "every application" creates "an impermissible risk of suppression of ideas," *City Council* v. *Taxpayers for Vincent*, 104 S. Ct. 2118, 2125 n.15 (1984), or of "selectively suppressing" disfavored "points of view," *Police Department of Chicago* v. *Mosley*, 408 U.S. at 97.[20] Moreover, just as

[20] This Court has repeatedly invalidated discretionary licensing schemes containing "nexus" requirements just as explicit as those in the statute here. The provision that school authorities are to take into account whether pro-homosexual teacher advocacy "may adversely affect students or school employees," for example, is plainly no less a grant of "uncontrolled discretion" over the exercise of First Amendment liberties, *Saia* v. *New York*, 334 U.S. 558, 562 (1948), than is a statutory provision that police chiefs must consider "annoyance or inconvenience of travelers upon any street or public places or of persons in neighboring premises" when deciding whether to issue permits for the use of loudspeakers in a community, *id.* at 559 n.1, *see id.* at 562 ("Annoyance at ideas can be cloaked in annoyance at sound"); a statutory provision that those licensing the solicitation of membership in dues-paying organizations must take into account "'effects upon the general welfare of the citizens,'" *Staub* v. *City of Baxley*, 355 U.S. 313, 322 (1958); or a statutory instruction that those licensing the distribution of handbills take into account whether the distributors will "importune or annoy the town's inhabitants," *Schneider* v. *State*, 308 U.S. 147, 157-58 (1939). Yet the licensing schemes containing these provisions were flatly invalidated upon their face.

The Court has been especially sensitive to the danger that such discretionary licensing schemes, like the one at issue here, free public officials *notwithstanding their "nexus" provisions* to suppress the expression of viewpoints triggering prejudice or disfavor. *See, e.g.*, *Kunz* v. *New York*, 340 U.S. 290, 292 (1951) (street sermonizing that "ridicule[s] and denounce[s] other religious beliefs"); *Procunier* v. *Martinez*, 416 U.S. 396, 415 (1974) (prisoner correspondence venting "unwelcome criticism" of prison officials").

was the case in *Secretary of State* v. *Joseph H. Munson Co.*, 104 S. Ct. at 2853, the "possibility of a waiver" of the statute's sanctions at the discretion of public authorities "may decrease the number of impermissible applications of the statute, but it does nothing to remedy the statute's fundamental defect" — here, its censorial targeting of particular groups and viewpoints.[21]

2. The speech chilled by the anti-advocacy provisions is protected by the First Amendment, even when advanced by public school teachers.

Appellant concedes that the anti-advocacy provisions "preclude" and "proscribe[ ]" speech (*see, e.g.*, Appellant's Brief at 11, 12); it simply argues that none of the speech proscribed is protected by the First Amendment. In support of this argument, appellant advances two theories: *first*, that advocacy of homosexual activity is unprotected *per se*; and second, that advocacy of homosexual activity, even if protected when engaged in by a private citizen, is *inherently* unprotected when engaged in by public school teachers. Both theories are wholly in error.

First, appellant asserts that Section 6-103.15's flat viewpoint-based censorship is unobjectionable because speech advocating, encouraging, or promoting homosexual activity is, *per se*, simply devoid of any legitimate public concern warranting First Amendment protection. Appellant suggests that such expression is unprotected because it refers to activity still deemed a crime by the Oklahoma legislature — even if the expression falls well short of imminently inciting action in violation of the criminal law.[22] But is is simply too late in the day to venture such an argument. This Court has long since held that the First Amendment forbids the proscription of "mere [abstract] advocacy" of, or "mere expression of belief" in, even the criminal overthrow of the government by force and violence. *Keyishian* v. *Board of Regents*, 385 U.S. at 600-01. "'[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to [unlawful] force and violence,' is . . . speech which our Constitution has immunized from governmental control." *Brandenburg* v. *Ohio*, 395 U.S. 444, 448 (1969) (per curiam) (quoting *Noto* v. *United States*, 367 U.S. 290, 297-98 (1961)).[23] And, absent advocacy directly inducing imminent lawless action, it has long been settled that the mere "undifferentiated fear or apprehension" that possible illegal activity might be encouraged is insufficient to overcome First Amendment rights, even in our public schools. *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503, 508 (1969).

If such protection is accorded even speech advocating criminal terrorism and sabotage against our government, clearly

[21] In *Munson*, the challenged statute barred charitable organizations from spending more than 25% of funds they solicited on overhead. The state's asserted aim was to prevent fraud. The Court found the fundamental defect of this statute to be its "mistaken premise that high solicitation costs are an accurate measure of fraud." 104 S. Ct. at 2852. The fact that the statute expressly authorized a waiver of the percentage limitation where it would "'effectively prevent a charitable organization from raising contributions,'" *id.* at 2845, was held not to cure the statute's impermissible prohibition of protected discussion and advocacy. The possibility that school officials might grant similar dispensation to *some* protected expression likewise supplies no cure here.

[22] *See, e.g.*, Appellant's Brief at 33-34; *see also id.* at 29-30 (conceding that the statute is not limited to barring speech inciting imminent unlawful activity). This posture is shared by the dissenting judge below, who states, "Political expression and association is at the very heart of the First Amendment. The advocacy of a practice as universally condemned as the crime of sodomy hardly qualifies as such." 729 F.2d at 1276-77 (App.11a) (Barrett, J., dissenting).

[23] *See also NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 927 (1982); *Healy* v. *James*, 408 U.S. 169, 188 (1972); *Whitney v. California*, 274 U.S. 357, 376-77 (1927) (Brandeis, J., concurring).

no less can be accorded speech abstractly advocating, encouraging, or promoting intimate and consensual homosexual activity which, although still deemed a crime in Oklahoma, has been decriminalized by over half the states.[24] The advocacy of activities one generation calls criminal may well be a vehicle for profound political and social change in the next. Thus, prior to this Court's decision in *Loving* v. *Virginia*, 388 U.S. 1 (1967), expression of support for interracial marriage was advocacy of activity criminal in the Commonwealth of Virginia. Prior to this Court's decision in *Roe* v. *Wade*, 410 U.S. 113 (1973), expression favoring freedom to choose abortion was advocacy of activity criminal in nearly all our states. And, prior to the adoption of the Nineteenth Amendment, to speak in favor of suffrage for women was to advocate activity amounting to the federal offense of "knowingly, wrongfully, and unlawfully voting."[25] To treat homosexual activity as an offense so heinous that *its* advocacy may be penalized in circumstances where advocacy of *other* currently criminal conduct would be protected, as do appellant and the dissent below,[26] is to ignore the central teaching of the First Amendment that no majority in this country may silence those who, however law-abiding, wish to express profound disagreement

[24] *See* Rivera, *Book Review*, 132 U. Pa. L. Rev. 391, 410-11 & nn.125-32 (1984). As early as 1955, the American Law Institute decriminalized private homosexual activity in its Model Penal Code. *See id.* at n.125.

[25] The great suffragist Susan B. Anthony was prosecuted, convicted, and jailed for this offense after casting a ballot in 1872. *See* Griffith, *In Her Own Right: The Life of Elizabeth Cady Stanton* 154 (1984).

[26] *See* Appellant's Brief at 29-30 (suggesting that the dangers of pro-homosexual teacher advocacy are "so grave" that such speech may be suppressed even where it falls well short of incitement under *Brandenburg*); *see also* 729 F.2d at 1277 (App.12a) (dissenting opinion) ("[T]he advocacy of violence, sabotage and terrorism . . . held in *Brandenburg* . . . to be protected speech unless demonstrated as directed to and likely to incite or produce such action *did not* involve advocacy of a crime *malum in se*. . .").

with the majority's rules of conduct, by advocating their repeal or by expressing support for the acts such rules currently outlaw and the groups such rules currently disfavor.

Second, appellant argues that, even if advocacy sympathetic to homosexuals were generally protected, the anti-advocacy provisions "proscribe[ ] no speech which is constitutionally protected *to public school teachers*" (Appellant's Brief at 11 (emphasis added); *see id.* at 36). This argument suggests that *teachers'* speech sympathetic to homosexuals is somehow *inherently* unprotected.[27] But no ruling of this Court remotely supports this suggestion.

To be sure, this Court has recognized that the speech rights of public employees are not absolute and, in particular, that a state may curtail public employee speech that directly impairs the interest of the state in promoting "the efficiency of the public service it performs through its employees." *Pickering* v. *Board of Education*, 391 U.S. 563, 568 (1968). Furthermore, in recognition of that state interest, the Court has held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest," *Connick* v. *Myers*, 103 S. Ct. 1684, 1690 (1983), that speech is simply "unprotected in the sense that employment-related sanctions may be imposed on the basis of such statements," *Bose Corp.* v. *Consumers Union*, 104 S. Ct. 1949, 1962 n.22 (1984).

But this Court has repeatedly made clear that speech by public school teachers *as citizens commenting on matters of public concern* enjoys the same protection as does "a similar contribution by any member of the general public," *Pickering* v. *Board of Education*, 391 U.S. at 572-73 — *unless* that speech manifestly disrupts the efficiency of the educational

[27] To the extent that this argument suggests instead that such speech even by teachers is generally protected, but that state interests here simply outweigh that protection, it is dealt with in I.B *infra*.

process.[28] For public speech on issues of "political, social, or other concern to the community" — when uttered by private citizen and public school teacher alike — occupies the very "'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection." *Connick* v. *Myers,* 103 S. Ct. at 1690, 1689 (quoting *NAACP* v. *Claiborne Hardware Co.,* 102 S. Ct. 3409, 3426 (1982)). This Court has thus vigilantly struck down state laws that "suppress the rights of public employees to participate in public affairs" by threatening discharge for joining associations, even those that public officials might find "'subversive.'" *Id.*[29] And this Court has likewise consistently overturned dismissals of school teachers for speaking out on matters of legitimate public concern, even when that speech was sharply critical of educational policies or practices.[30]

There can be no question that Oklahoma's anti-advocacy provisions are targeted at speech by teachers speaking as citizens on matters of public concern, not at speech on matters of mere private interest. Public debate about the decriminalization of homosexual activity; about the wisdom of enacting civil rights protections for those who engage in homosexual

[28] *See, e.g., Givhan* v. *Western Line School District,* 439 U.S. 410, 414 (1979); *Abood v. Detroit Board of Education,* 431 U.S. 209, 230-32 (1977) (public school teachers are, in general, as free under the First Amendment as are their private counterparts to engage in public "expression about philosophical, social, artistic, economic, literary, or ethical matters — to take a nonexhaustive list of labels," whether or not such speech is properly describable as "political"); *see also Keyishian* v. *Board of Regents,* 385 U.S. at 602-04.

[29] *See, e.g., Keyishian* v. *Board of Regents,* 385 U.S. at 605-10 (rights of teachers); *Shelton* v. *Tucker,* 364 U.S. 479, 490 (1960) (same); *Wiemann* v. *Updegraff,* 344 U.S. 183, 191 (1952) (same).

[30] *See, e.g., Pickering* v. *Board of Education,* 391 U.S. at 571-72 (holding that teacher's criticism of school administrators' allocation of funds as between athletics and academics is protected speech); *Givhan* v. *Western Line School District,* 439 U.S. at 412-13, 415-16 (holding that teacher's criticism of school's employment policies as racially discriminatory is protected speech).

activity; and about how such activity should be regarded as a matter of medicine, morals, and culture, has occupied an important and highly visible place on the legislative agendas of countless state and local governments in our country in the recent past. Such issues have likewise captured the attention of our national political parties and news media. As Justice Tobriner wrote half a decade ago, "the subject of the rights of homosexuals incites heated political debate today," and "[t]he aims of the struggle for homosexual rights . . . bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities." *Gay Law Students Ass'n* v. *Pacific Tel. & Tel.,* 595 P.2d 592, 610 (Cal. 1979).

Neither appellant nor the Attorney General of Oklahoma, writing for the state as amicus curiae, denies that the advocacy proscribed by Section 6-103.15 touches matters of public interest;[31] they simply assert that such advocacy, precisely *because* of its controversial content, is *inherently* disruptive of orderly educational process in the public schools.[32] The short

[31] Indeed, the Attorney General candidly concedes that the Oklahoma law applies to "advocacy of issues which are controversial," to "advoca[cy] of social causes," and to "'gay rights' activis[m]" by teachers. *See* Brief of the State of Oklahoma as Amicus Curiae (hereinafter, "Oklahoma Brief"), at 3-4, 20, 22.

[32] *See* Appellant's Brief at 34-35 (teacher advocacy of homosexual activity, "[w]hen it comes to the attention of other teachers or co-workers, . . . is likely to produce sufficient controversy, suspicion, and mistrust so as to threaten employee discipline, co-worker harmony, and that personal loyalty and confidence requisite to particularly close employee relationships"); *see also id.* at 29-30 (when such advocacy comes to the attention of students, it disrupts their "normal process of social integration"). *See* Oklahoma Brief at 3-4, 20 ("A state should be permitted to require that a public school teacher remain neutral with regard to public advocacy of issues which are controversial and which may [thus] promote strife within a school system"). In light of this view held by the relevant public authorities of Oklahoma, it is even clearer why no teacher attached to his or her job will venture even arguably proscribed pro-homosexual speech in the hope of perhaps gaining administrative reprieve under the so-called "nexus requirements." *See* I.A. *supra.*

answer to this suggestion, however, is that public expression in our constitutional system does not lose its protection merely because exposure to its content may be offensive to some who hear it.[33] As the Chief Justice recently stated for a unanimous Court in another context, "The Constitution cannot control such prejudices but neither can it tolerate them" as grounds for overriding a constitutional right. *Palmore* v. *Sidoti*, 104 S. Ct. 1879, 1882 (1984) (public hostility to interracial families cannot justify racially discriminatory custody award). The First Amendment forbids any state to declare inherently unprotected a category of advocacy which, however controversial, falls into none of the narrow and well-defined classes of expression this Court has deemed unprotected. It likewise bars any state from defining a category of public employee speech, however controversial, as inherently disruptive of the employee's public workplace — even if that workplace is a school. The *Pickering* balance, on the contrary, must be struck on a case-by-case basis, *see* 391 U.S. at 568, with an eye to the disruptive *effects* of speech, *not* to the *viewpoint* it expresses.

B. The Statute's Flat Censorship Is Wholly Unnecessary To Serve, And Does Not Closely Fit, Any Legitimate State Interest In Preventing Incitement Of Criminal Activity Or Disruption Of The Education Of Children In The Public Schools.

Appellant seeks at length to justify the anti-advocacy provisions as appropriately and narrowly tailored to serve the state's

[33] *See, e.g., Carey* v. *Population Services International*, 431 U.S. 678, 701 (1977); *Healy* v. *James*, 408 U.S. 169, 187-88 (1972); *Terminiello* v. *Chicago*, 337 U.S. 1, 4 (1949) ("[a] function of free speech under our system is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger").

special interests in protecting school children and in avoiding disruption to the educational process. *See, e.g.*, Appellant's Brief at 29-31, 34-35; *see also id.* at 23-26. The anti-advocacy provisions, however, create *not* a viewpoint-neutral ban on conduct that incites or disrupts and happens to do so through the vehicle of speech, but a viewpoint-specific burden on speech that might happen to incite or disrupt. And this Court has *never* held that content-based and viewpoint-stifling regulations of teacher speech can survive the scrutiny of the First Amendment if the legitimate ends served by such regulations could be achieved by less restrictive, viewpoint-neutral means. On the contrary, the principle that government must not favor certain viewpoints over others in its regulation of speech — even speech by public employees when they venture as citizens into the public arena — means at the very least that incitement or disruption must be neutral triggers, not substantively slanted excuses, for the invocation of government's power to penalize speech.

Indeed, it is precisely in the context of public educational employment that this Court has repeatedly stated that, "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). "Precision of regulation must be the touchstone," *NAACP* v. *Button*, 371 U.S. 415, 438 (1963), *above all* in the public schools, where any unnecessary inhibition of freedom of thought, speech, or inquiry "has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice," for teachers are, "from the primary grades to the university . . . the priests of our democracy." *Wieman* v. *Updegraff*, 344 U.S. 183, 195, 196 (1952)

(Frankfurter, J., concurring).[34] Far from regulating with precision, however, the anti-advocacy provisions are both ill-fitted to the state's asserted goals, and wholly gratuitous to achieving them.

1. The anti-advocacy provisions sweep far beyond speech that incites or disrupts.

As appellee has never disputed, the state is entirely free under the First Amendment to proscribe teachers' advocacy that "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg* v. *Ohio,* 395 U.S. at 447. As appellee has likewise never disputed, the state is entirely free under the First Amendment to deny public employment to a teacher whose public expression, even on a matter of public concern, can be shown to have "impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally." *Pickering* v. *Board of Education,* 391 U.S. at 572-73. The anti-advocacy provisions, however, are in no way tailored to fit these legitimate state interests.[35]

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[34] As Justice Frankfurter went on to say, in words most apposite here, "It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them." 344 U.S. at 196. Appellant's claim that Oklahoma's *censorship* of its teachers' speech somehow promotes respect among students for our "governmental process" (*see* Appellant's Brief at 34) gets these fundamental principles entirely backwards.

[35] Appellant and the State Attorney General do assert one interest that the anti-advocacy provisions arguably fit closely: an interest in ensuring that school children be carefully shielded from teachers whose expressed opinions fail to fit an orthodox mold the state deems consistent with "normal . . . social integration" (Appellant's Brief at 30) and complete "political neutrality" (Oklahoma Brief at 20). But *that* interest is flatly illegitimate. For, while teachers are indisputably "role model[s]" who influence the "perceptions," "values," and "attitudes" of students, *see Ambach* v. *Norwick,* 441 U.S. 68, 79 (1979), "probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing," *West Virginia Board of Education* v. *Barnette,* 319 U.S. 624, 641 (1943). Indeed, this Court has always repudiated states' claims that they may conduct their schools so as to "foster a homogeneous people," *Meyer* v. *Nebraska,* 262 U.S. 390, 402 (1923).

First, even appellant apparently concedes — as the language and history of Section 6-103.15 plainly require it to concede — that nothing in the statute limits the reach of its anti-advocacy provisions to speech by public school teachers that will incite "impressionable school children" to "imminently commit the crime of homosexual sodomy." Appellant's Brief at 29-30.[36] Thus the provisions indisputably apply to speech of a sort generally protected by the First Amendment as construed in *Brandenburg* v. *Ohio.*

Second, the anti-advocacy provisions apply fully even to the sorts of teacher speech that the First Amendment, as construed in *Pickering,* would protect because that speech disrupts neither the classroom nor the efficient administration of the schools. *See* I.A(2) *supra.* Appellant's entire argument that the provisions do *not* sweep so broadly stands or falls with its claim that the statutory criteria it labels "nexus requirements" —

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[36] Indeed, nothing in the statute even limits its censorship to speech that is heard by *children* at all, for a teacher may be fired on the basis of speech likely to come *solely* to the attention of adult "school employees." *See* Section 6-103.15(A)(2). Under the First Amendment, however, no state can "reduce the adult population . . . to [hearing] only what is fit for children." *Butler* v. *Michigan,* 352 U.S. 380, 383 (1957). And this statute is plainly in *no* way limited to speech whose very production involves the *abuse* of children, as was the statute upheld in *New York* v. *Ferber,* 458 U.S. 747, 756-57 (1982).

notwithstanding their facial irrelevance to teachers' job competence — narrow the statute to speech unprotected under *Pickering*.[37]

Far from limiting the statute to the disruptive speech unprotected under *Pickering*, however, these criteria leave schools entirely free to fire teachers, and to reject teacher applicants, on the basis of a broad range of speech that neither impedes their efficacy in the classroom nor impairs the efficiency of the school's administrative hierarchy. Clearly the fact that a teacher speaks in a manner open and public enough for the school's students and employees to find out about the teacher's views in no way determines whether the speech is disruptive. *See* note 19 *supra*. Nor does the fact that the speech "may adversely affect" students or co-workers in some unspecified way (the first factor) guarantee its disruptiveness; such a flimsy "standard" could easily be triggered by the slightest personal offense or objection taken by the most sensitive hearer. *Cf. Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971) (city control of traffic obstructions may not depend on "whether or not a police-

[37] The statue provides that "[t]he following factors will be considered in making the determination whether the teacher . . . has been rendered unfit:

1. The likelihood that the [expression] may adversely affect students or school employees;
2. The proximity in time or place of the [expression] to the teacher's . . . official duties;
3. Any extenuating or aggravating circumstances; and
4. Whether the [expression] is of a repeated or continuing nature which tends to encourage or dispose school children toward similar [expression, or toward public homosexual activity]."

Appellant also labels as a "nexus" requirement the fact that speech subject to the anti-advocacy provisions must be made in a "manner" likely to "come to the attention of school children or school employees," *see* Section 6-103.15(A)(2).

man is annoyed"). Proximity to the school itself (the second factor) need have nothing at all to do with the disruptiveness of speech. *Cf. Police Department of Chicago* v. *Mosley*, 408 U.S. at 99-101. Neither does the frequency of its utterance or its persuasiveness (the fourth factor).[38] Finally, to hold speech hostage to the standardless discretion of administrators to decide what circumstances are "extenuating or aggravating" (the third factor), *cf. Kolender* v. *Lawson*, 103 S. Ct. 1855, 1858-59 (1983), is little better than a licensing scheme permitting the selective suppression of disfavored points of view. *See Police Department* v. *Mosley*, 408 U.S. at 97; *see also* note 20 *supra*.

None of these supposedly "narrowing" criteria even remotely tracks the legitimate interest of the state in preventing actual disruption of the educational process,[39] and so the anti-advocacy provisions fail to respect "the boundaries of . . . speech etched by the Constitution itself," *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 784 (1978). For the anti-advocacy provisions — pegged as they are, despite the "nexus requirements," to the *viewpoint* rather than the *effects* of the speech proscribed — cannot themselves distinguish such instances of disruptive advocacy from pro-homosexual advocacy that is fully protected by the First Amendment, even in the public school context, because it causes *no* genuine disruption.

[38] Indeed, far from being a narrowing device, this factor actually aggravates the statute's affront to the First Amendment. To count as additional evidence of a teacher's "unfitness" the degree to which his or her speech "tends to encourage or dispose children toward similar conduct," under *this* statute, is to penalize speech more severely the more it serves the protected purpose of promoting dialogue, for in *this* statute, encouraging "conduct" means encouraging students' speech that might be deemed sympathetic to homosexuality.

[39] Likewise, the "nexus requirements" map out no hard "core of easily identifiable and constitutionally proscribable conduct," *Secretary of State* v. *Joseph H. Munson Co.*, 104 S. Ct. at 2852, that could save the anti-advocacy provisions from substantial overbreadth.

Cf. Secretary of State v. *Joseph H. Munson Co.*, 104 S. Ct. at 2852.[40]

The fact that the anti-advocacy provisions might *happen* to sweep in some imaginable instances of pro-homosexual advocacy that could legitimately be penalized because disruptive of a school's educational mission,[41] is thus "little more than fortuitous," *id.* at 2853. Indeed, the fact that an improperly censorial statute's blows might happen to fall on some unprotected utterances has never been sufficient to save such a statute from facial invalidation by this Court.[42]

Thus, in *Procunier* v. *Martinez*, 416 U.S. 396 (1974), the Court struck down on their face previously unconstrued state prison regulations censoring prisoners' correspondence expressing grievances or political, racial, religious or other views which prison authorities might deem inflammatory or otherwise inappropriate. Such censorship was held wholly unnecessary to

[40] In *Munson*, this Court invalidated a statute it found similarly incapable of distinguishing between those charities whose expenses exceeded 25% of their solicitation income for unprotected reasons, such as fraud or mismanagement, from those whose expenses were high for protected reasons, such as the importance to their enterprise of dissemination of information. *See* 104 S. Ct. at 2852.

[41] For example, if a group of teachers vocally and demonstratively protested a high school principal's refusal to let a male student take another boy to the senior prom, *cf. Fricke* v. *Lynch*, 491 F. Supp. 381 (D.R.I. 1980) (Pettine, J.), and if uproar and mounting violence in the school community ensued, the situation might present a case for constitutionally permissible sanctions against such genuinely disruptive speech. *But see id.* (holding undifferentiated fear of disturbance insufficient to overcome student's First Amendment rights). Of course, school authorities would be fully able to apply sanctions against any similarly disruptive teacher protest that might be mounted concerning issues wholly unrelated to homosexuality — without any need to create a viewpoint-based analogue to Section 6-103.15. *See* II.B(2) *infra*.

[42] Whatever degree of overbreadth might be required to doom an otherwise *acceptable* law, it has never been the case that an otherwise *void* law may be rescued by a showing that some of the acts or utterances it reaches are constitutionally unprotected.

the furtherance of substantial governmental interests in security, order, and rehabilitation. *Id.* at 415-16. It did not save the statute that some of the letters censored under the regulations might in fact threaten such interests, and might thus be legitimately proscribable under an appropriately narrowed policy. *See id.* at 416 (some of the letters subject to censorship might have encouraged prison violence). In *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975), an ordinance banning the showing of nudity on drive-in movie screens was invalidated on its face for sweeping "far beyond the permissible restraints on obscenity," *id.* at 208 — notwithstanding the obvious fact that the ordinance also swept some bannable obscenity within its reach. And, in *Virginia Board of Pharmacy* v. *Virginia Consumer Council*, 425 U.S. 748 (1976), the Court struck down facially a previously unconstrued state statute deeming it unprofessional conduct for a pharmacist to advertise his drug prices — notwithstanding the fact that this prohibition on speech would no doubt keep some unprotected deceptive advertising out of the public domain along with a vast range of protected truthful messages, *see id.* at 771.

In each of these cases, as here, the fatal vice of the law in question was that its restriction of speech on the basis of content or viewpoint in no way adhered, as the First Amendment requires, to the boundaries of legitimate government interests.[43]

[43] Indeed, the anti-advocacy provisions violate those boundaries not only by being overinclusive, as demonstrated above, but also by being underinclusive. The state, though *assertedly* seeking to protect children from disruptive exposure to those who might be perceived to advocate criminal activity, has singled out pro-homosexual advocacy while subjecting *no* other advocacy — *e.g.*, of heterosexual sex offenses — to sanction, except by way of the general teacher-competence statute, Section 6-103. Such specific targeting of only *one* of the types of speech that implicate a state interest belies the state's sincerity in serving that interest. *Cf. First National Bank* v. *Bellotti*, 435 U.S. at 793 (where a ban on corporate speech bans expenditures on referenda but not on lobbying or other political causes, "the fact that a particular kind of ballot ques-

And in each of those cases, as here, those interests were wholly capable of advancement by less restrictive, content- or viewpoint-neutral means.

2. Viewpoint-neutral alternatives to the anti-advocacy provisions are readily available to the state.

The Tenth Circuit's invalidation of the anti-advocacy provisions leaves the State of Oklahoma fully free to prevent disruption of the educational process in its public schools, and to protect the physical and mental welfare of its students — just as this Court's invalidation of the prison censorship scheme in *Procunier* left the state free to prevent disorder in its prisons; as this Court's invalidation of the anti-nudity ordinance in *Erznoznik* left the state free to prevent the publicly visible showing of obscene films; and as this Court's invalidation of the anti-advertising ban in *Virginia Board of Pharmacy* left the state free to prevent false or misleading pharmaceutical advertising. All that the Constitution requires is that such unprotected speech be narrowly and neutrally targeted.

In fact, the decision below left in place, in the form of unchallenged Section 6-103,[44] a less censorial mechanism amply authorizing discharge of any public school teacher who actually incites criminal conduct or causes disruption in the schools — regardless of the substantive content or viewpoint expressed.

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tion has been singled out for special treatment" calls into question the sincerity of the state's asserted interest in generally "protecting shareholders").

[44] *See* Statement of the Case, *supra*. In addition to Section 6-103, Oklahoma's criminal laws against the solicitation, molestation, or corruption of children furnish the State clear protection against any teacher — homosexual *or* heterosexual — who were ever to so harm his charges. *See, e.g.*, Okla. Stat., Title 21, Sections 856 & 857(4)(a), (e), (f) (contributing to delinquency of minors); Section 1123 (lewd or indecent proposals to child under 16).

Any genuinely unprotected speech that might have been reached by the excised anti-advocacy provisions would surely subject a teacher to dismissal under that mechanism.[45] But it is *only* for actually causing or directly threatening disruption, and not for the viewpoint expressed, that a teacher's speech may ever be so penalized. And the very redundancy of the anti-advocacy provisions insofar as they could ever be applied permissibly — *i.e.*, the very fact that some of the conduct these provisions might constitutionally reach is *already* subject to the state's control — simply confirms the ready availability of less drastic means by which Oklahoma may achieve its legitimate aims. The Tenth Circuit's surgical excision of the anti-advocacy provisions from Oklahoma law thus leaves the state in no way powerless to defend its legitimate interests.[46]

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[45] If a teacher spoke out in such a way as to genuinely threaten his charges — for instance, by publicly endorsing the seduction of young children — school authorities would hardly need the invalidated portion of Section 6-103.15 to authorize that teacher's dismissal — whether the threat were homosexual or heterosexual. Such advocacy would surely raise questions of competence and moral turpitude under Section 6-103. *Cf. Hollon v. Pierce*, 257 Cal.App.2d 468, 64 Cal. Rptr. 808 (3d Dist. 1967) (city may discharge school bus driver who believes in the religious sacrifice of children).

[46] Indeed, as one commentator has argued, facial invalidation of a job disqualification scheme such as Oklahoma's *never* "leave[s] the government powerless to protect itself," for unlike the invalidation of a *criminal* statute on overbreadth grounds, which effectively immunizes even unprotected activity committed prior to the enactment of a new valid criminal law, *see, e.g., Gooding v. Wilson*, 405 U.S. 518 (1972), "the elimination of overbroad schemes for screening employees or professionals does not prevent immediate and hoc screening." Bogen, *First Amendment Ancillary Doctrines*, 37 Md. L. Rev. 679, 706 (1978).

II. ABSTENTION WOULD BE WHOLLY INAPPROPRIATE IN THIS CASE.

Appellant, never having urged *Pullman*[47] abstention below,[48] does not squarely urge it even now, but speaks vaguely of "dismissal or abstention, with certification of any residually relevant question of law to the Supreme Court of Oklahoma." Brief of Appellant at 16; *id.* at 8, 17-18. But the only state-law ruling that Appellant proposes is one that would in no sense "render adjudication of the federal question unnecessary," *Hawaii Housing Authority* v. *Midkiff*, 104 S.Ct. 2321, 2327 (1984), for Appellant speaks only of "the possibility that the Oklahoma Supreme Court would interpret the statute to require the presence of at least one of the four nexus factors." Brief of Appellant at 17. Yet, as demonstrated above, those factors are utterly incapable of shoring up the statute's basic flaws — its facial burdening of pure speech that neither incites nor disrupts nor falls within any other established category of unprotected utterance, and its explicit burdening of speech based upon the viewpoint being expressed.

Indeed, given the vagueness of the statute's over-inclusive and viewpoint-targeted proscription (*see* note 18, *supra*) and the amorphous character of the discretionary, *post hoc* licensing

[47] *Railroad Commission of Texas* v. *Pullman Company*, 312 U.S. 496, 500-502 (1941).

[48] Failure to raise the possibility of abstention in any lower court may itself constitute a ground on which this Court may decline that option. *Vance* v. *Universal Amusement Co.*, 445 U.S. 308, 315 n.11 (1980) (per curiam) ("since [abstention] was not raised in the Court of Appeals, we decline the invitation"); *see also Chicago* v. *Atchison, Topeka & Santa Fe Railway Co.*, 357 U.S. 77, 84 (1958); *Hostetter* v. *Idlewild Liquor Corp.*, 377 U.S. 324, 329 (1964); *cf. Lehman Bros.* v. *Schein*, 416 U.S. 386, 393, 395 (1974) (Rehnquist, J., concurring) (Court should hesitate to accept suggestion even of less burdensome alternative of certification of questions to the state's highest court, when suggestion was not made to trial or appellate court below).

scheme of which that proscription is a part (*see* text at note 20 *supra*), it is most unlikely that any single state court adjudication — even if a relevant state proceeding were already pending — could eliminate the statute's constitutional infirmities. In fact, no relevant state proceeding is underway. But, even if one were, "it would require 'extensive adjudications under the impact of a variety of factual situations,' to bring the challenged statute . . . 'within the bounds of permissible constitutional certainty.'" *Procunier* v. *Martinez*, 416 U.S. at 401 n.5 (quoting *Baggett* v. *Bullitt*, 377 U.S. at 378).

In such situations, abstention is peculiarly "inappropriate," *Babbitt* v. *Farm Workers*, 442 U.S. 289, 308 (1979), for its consequence would be to compel all to whom the statute's literal language plainly extends — here, all public school teachers and would-be teachers in Oklahoma — to "forswear all activity arguably within the scope of the [statute's] vague terms," *Procunier* v. *Martinez*, 416 U.S. at 401 n.5, as the only safe course to follow absent authoritative prior guidance as to just which utterances, or which expressive or associational activities, in which settings, would only *apparently* jeopardize their jobs. That "[f]ree speech may not be so inhibited," *Baggett* v. *Bullitt*, 377 U.S. at 372, counsels against abstention as an *institutional* matter no less than it counts against the statute's validity as a *substantive* matter. *See also Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 287 (1961); *Smith* v. *California*, 361 U.S. 147, 151 (1959); *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958).

To be sure, a state court *could* always hold — despite the manifestly broader language of the statute and the Oklahoma Attorney General's ambitious defense of its full sweep[49] —

[49] The Oklahoma Attorney General contends that the statute enables school boards to exclude from the teaching profession "'gay rights' activists," Brief of Oklahoma at 22, and any teacher who takes a stand on "issues which are con-

that the statute would thenceforth extend *only* to demonstrably inciting, disruptive, or otherwise unprotected teacher utterance, and only in a viewpoint-neutral manner. In effect, a state court *could* rewrite the statute altogether if it chose to do so.[50] But if the statute's terms "are not susceptible of a narrowing construction . . . because a rewriting of the [law] would be necessary," *Erznoznik* v. *City of Jacksonville*, 422 U.S. 216 & n.15, abstention is inappropriate. The "bare . . . possibility" of judicial rewriting is insufficient to invoke *Pullman*. *See Hawaii Housing Authority* v. *Midkiff*, 104 S.Ct. at 2327. Requiring that federal courts await the possibility of such state court actions even for statutes like this would permit the impermissible chill of protected speech to persist, and to cause irreparable harm, for months or years until eventually thawed by the state judiciary — effectively negating Congress' design, through 42 U.S.C. § 1983, to provide an independent federal

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troversial, *id*. at 3-4, whether inside or "outside the classroom," *id*. at 24, as an exercise of the state's legitimate interest in purging the classroom of "advocates of social causes," *id*. at 20.

[50] Such wholesale judicial amendment of legislation, however, is contrary to the practice of the Oklahoma Supreme Court. That tribunal "will not place such a strained construction on the plain words of [an act] that [the court would] judicially impose a different meaning than the legislature intended," *Thornton* v. *Woodson* 570 P.2d 340, 342 (S.Ct. Okl. 1977), nor will it "read into the statute exceptions which are not made by the legislative body." *Grand River Dam Authority* v. *Oklahoma*, 645 P.2d 1011, 1018 (S.Ct.Okl. 1982). Yet any judicial construction that could make Section 6-103.15 constitutional by limiting the grounds for dismissal to speech that disrupted the school or incited imminent lawless conduct would necessarily render the statute redundant of Section 6-103 — and the Oklahoma Supreme Court will not presume the legislature to enact surplusage, *Hunt* v. *Washington Fire & Marine Insurance Co.*, 381 P.2d 844, 847 (S.Ct.Okl. 1963); *Sisk* v. *Sanditen Investments Ltd.*, 662 P.2d 317, 320 (Okl.App. 1983). Moreover, no such *narrowing* state court construction could cure the statute's gross *under*inclusiveness, *see* note 43 *supra*.

forum as an *alternative* to state courts for the prompt and effective protection of federal constitutional rights.[51]

The *Pullman* doctrine " 'is not a broad encyclical commanding automatic remission to the state courts of all federal constitutional questions arising in the application of state statutes,' " *Zwickler* v. *Koota*, 389 U.S. 241, 250-51 (1967) (quoting *United States* v. *Livingston*, 179 F.Supp. 9, 12 (E.D.S.C. 1959), *aff'd*, *Livingston* v. *United States*, 364 U.S. 281 (1960)) — *especially* "when, as in this case, the attack upon the statute on its face is for repugnancy to the First Amendment. In such a case to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." 389 U.S. at 252; *see also Procunier* v. *Martinez*, 416 U.S. at 404 (abstention exacts a "high cost . . . when the federal constitutional challenge concerns facial repugnance to the First Amendment"). In that event, "free expression — of transcendent value to all society, and not merely to those exercising their rights — might be the loser." *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965).

Even if it involved no delay and no interim suppression of protected speech, abstention under these circumstances would remain a meaningless calisthenic. This Court has "frequently emphasized that abstention is not to be ordered unless the statute is . . . *obviously* susceptible of a limiting construction." *Hawaii Housing Authority* v. *Midkiff*, 104 S.Ct. at 2327 (em-

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[51] It has long been settled that, in § 1983 suits, "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Monroe* v. *Pape*, 365 U.S. 167, 183 (1961). "When federal claims are premised on 42 U.S.C. § 1983 . . . [this Court] ha[s] not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has assigned to the federal courts to protect constitutional rights." *Steffel* v. *Thompson*, 415 U.S. 452, 472-73 (1974). *Accord*, *Patsy* v. *Board of Regents of State of Florida*, 457 U.S. 496, 501-06 (1982).

phasis added) (citing *Zwickler* v. *Koota*, 389 U.S. at 251 n.14). "[W]here as here, [Appellant] offers several distinct justifications for the ordinance in its broadest terms, there is no reason to assume that the ordinance can or will be decisively narrowed." *Erznoznik* v. *City of Jacksonville*, 422 U.S. at 217.[52]

Nor does any legitimate state concern point toward abstention here. Unlike circumstances in which a federal court's facial invalidation of a state statute immunizes constitutionally unprotected conduct from state control until a narrowing rehabilitation of the voided law is later provided by a state court, no such windfall for unprotected behavior, and no such costs to legitimate state interests, are realistically risked by non-abstention in this case. For, as has been shown above, the body of state law left fully intact by the decision below *already* provides the state with whatever tools an adequately narrowed version of the invalidated provision could add. Where, as here, the provisions struck down by a federal court are wholly *redundant* insofar as they might reach unprotected speech, the high costs of abstention are demonstrably not worth incurring.

But even if this Court entertains doubts as to the meaning of relevant aspects of state law, in no event should Appellee and its members be required to pursue protracted proceedings afresh, climbing the ladder of the state's judicial system from the bottom rung up simply to give that system an opportunity

[52] For example, the Attorney General insists that the state may force its teachers to remain silent on "controversial" issues, Brief of Oklahoma at 3-4, and abstain from the "advoca[cy] of social causes," *id.* at 20. Appellant Board of Education similarly maintains that any advocacy that falls under the ban of the Oklahoma law, including advocacy of equal civil rights for homosexuals, "furthers no important political or social community interest," and is entitled to "little — if any — First Amendment protection, *even if uttered by a member of the citizenry as a whole*." Brief of Appellant at 33-34 (emphasis in original).

to hold, perhaps years hence, precisely what the federal court below has quite properly held already.[53]

Conclusion

At issue in this case is not the state's authority to protect and educate its children or to enforce criminal laws against homosexual acts, but solely its power to censor public speech directly or indirectly sympathetic to homosexuals by all who would teach the state's youth. Whatever one's views about state power over personal conduct in this controversial realm, few lessons the state could impart would be less compatible with our constitutional ideals than the lesson that censorship

[53] Thus, if this Court were to deem it necessary to obtain authoritative guidance from Oklahoma's courts on the precise scope of Section 6-103.15, the case should not be remanded for abstention by the courts below while Appellee initiates a new lawsuit in the lower state courts. Rather, any pertinent state-law questions should be certified directly by this Court to the Oklahoma Supreme Court as provided in 20 Okla. Stat. Section 1602. See Brief of Appellant at 16. No remand for this purpose would be needed, for the Oklahoma certification statute expressly provides that the state's highest court "may answer questions of law certified to it by the Supreme Court of the United States." This Court has often employed such direct certification procedures, *see e.g. Zant* v. *Stephens*, 456 U.S. 410, 414-17 (1982); *Elkins* v. *Moreno*, 435 U.S. 647, 668-69 (1978); *Aldrich* v. *Aldrich*, 375 U.S. 249, 251-52 (1963); *Dresner* v. *Tallahassee*, 375 U.S. 136, 138-39 (1963) (per curiam) — procedures which, no less than abstention, "help[ ] build a cooperative judicial federalism," *Bellotti* v. *Baird*, 428 U.S. 132, 151 (1976) (quoting *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974)). While abstention invariably delays litigation significantly and multiplies its cost without even guaranteeing eventual resolution of state law questions by the state's highest court, *see* Field, *The Abstention Doctrine Today*, 125 U.Pa.L.Rev. 590, 604 (1977), certification at least achieves some efficiency and certitude by bypassing lower state court litigation and going directly to the source, thereby saving "time, energy, and resources," *Bellotti* v. *Baird*, 428 U.S. 150-51; *see Lehman Bros.*, 416 U.S. at 391.

of those views — and the stark silence such censorship imposes — would sadly convey. Because the court below simply recognized this enduring truth when it excised such gratuitous censorship from the state's laws, the judgment of the circuit court should be affirmed.

Respectfully submitted,

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